TAY LAI HENG & ANOR.

v.

TAY LAI HOCK

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL SUIT NO. 22-61 OF 1988]
24 NOVEMBER 1990

SUCCESSION: *Probate - Appointment of receiver - Will challenged - Undue influence - Testamentary incapacity - Discretion of Court - Question of degree - Prima facie title.*

The plaintiffs, P1 and P2, and the defendants D are brothers. On 29 March 1979, their mother whilst living with D, executed a will; she died on 12 September 1985. Under the will, apart from RM2,000 to each of her 9 children, the rest of her assets (approximately valued at 8 million) devolved upon D. D's petition for probate was caveated by P1, P2 and sister S. The latter were challenging the will and applied for the appointment of a receiver to manage the estate of their deceased mother. D objected to the appointment of a receiver.

The issue here was the principles on which the Court would appoint a receiver.

Held:

[1] For a receiver to be appointed, the following requirements have to be satisfied:

(a) the plaintiffs had a good *prima facie* claim to the assets in question;

(b) there was danger of the assets being wasted within the meaning of s. 45 of the Probate & Administration Act 1959; and

(c) the plaintiffs would be in a worse situation unless a receiver was appointed.

[2] On the affidavit evidence and in the light of the following facts, namely:

(a) the infirmity of the deceased at the time of the execution of the will and within the 100-day mourning period for her husband's death;

(b) the uncharacteristic fact of the defendant being made effectively the sole beneficiary of the very substantial assets of the deceased in a traditional Chinese family where there are other sons;

(c) the rather unusual steps that were taken for the will to be attested not by one but by two lawyers and for the certification of her mental capacity to be made by an important local personage who was an orthopaedic surgeon when a physician or ordinary medical practitioner would have sufficed; and

(d) the transfer of properties belonging to the estate of the deceased to the children of the defendant after notice had been given to his solicitors that the will was being challenged.

the requirements in [1] were satisfied.

[Plaintiffs' application granted.]

Legislation referred to:
Probate and Administration Act 1959, s. 45

Other source referred to:
Law and Practice as to Receivers and Administrators (17th Edn.) by Kerr

For the plaintiffs - G.S. Nijar (C.Y with him); Chok; M/s. Nijar & Nijar
For the defendant - K.F. Wong; M/s. Gulam & Wong

JUDGMENT

LC Vohrah J:

This was an application by way of a summons-in-chambers on the part of the plaintiffs in this suit for a receiver to be appointed to manage the estate and effects of their mother, one Madam Tan Kah Kim (the deceased) who left a will.

The plaintiffs and the defendant are brothers, three of nine children of the deceased. She executed a will on 29 March 1979 at the age of 77 and died on 12 September 1985 at the age of 83. At the time when the will was executed she lived with the defendant and by the contents of the will save for RM2,000 to be given to each of the children the rest of the assets (now valued by the plaintiffs at RM8,000,000) was to devolve upon the defendant. Under the will the defendant and a sister one Madam Tay Gek Lang were named as executors but the latter declined appointment. On 17 March 1987 the defendant filed a petition for probate of the will in Petition No. 45-5 of 1987 but a caveat was lodged by the plaintiffs and a sister by the name of Tay Gek Lui. In consequence of a summons for directions having been taken on 1 February 1988 in the probate matter it was ordered that a writ endorsed with a statement of claim be filed in the present suit by the plaintiffs who seek to set aside the will on several grounds including undue influence and testamentary incapacity. Very serious allegations have been made in the statement of claim and repeated in the affidavit in support of the present application. An early trial has been ordered in the present suit and although Counsel for the defendant conceded that the Court had the power to appoint a receiver as prayed in the present application he contended that none should be appointed pending the hearing of the suit unless the Court was satisfied that:

(1) the plaintiffs had a good *prima facie* claim to the assets in question;

(2) there was danger of the assets being wasted within the meaning of s. 45 of the Probate & Administration Act 1959; and

(3) the plaintiffs would be in a worse situation unless a receiver was appointed.

Kerr on the *Law and Practice as to Receivers and Administrators* (17th Edn.) whilst dealing with the appointment of a receiver to preserve property and, where required, to ensure its proper management pending litigation to decide the rights of the parties states (at pp. 6 and 7):

> the appointment then rests on the sound discretion of the Court. In exercising its discretion, the Court proceeds with caution, and is governed by a view of all the circumstances. No positive or unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of interim protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, it is the common interest of all parties that the Court should prevent a scramble, and a receiver will readily be appointed; as, for instance, over the property of a deceased person, pending a litigation as to the right to probate or administration. But where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case presents more difficulty. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. Where the evidence on which the Court is to act is very clearly in favour of the plaintiff, then the risk of eventual injury to the defendant is very small, and the Court does not hesitate to interfere.

> Where there is more doubt, there is, of course, more difficulty. The question is one of degree, as to which, therefore, it is impossible to lay down any precise or unvarying rule.
>
> If the Court is satisfied upon the materials it has before it that the party who makes the application has established a good *prima facie* title, and that the property the subject-matter of the proceedings will be in danger, if left until the trial in the possession or under the control of the party against whom the appointment of a receiver is asked for, or, at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed, the appointment of a receiver is almost a matter of course. If there is no danger to the property, and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed.

On the affidavit evidence available I found the following facts established by the plaintiffs for challenging the will, namely the infirmity of the deceased at the time of the execution of the will and within the 100-day mourning period for her husband's death; the uncharacteristic fact of the defendant being made effectively the sole beneficiary of the very substantial assets of the deceased in a traditional Chinese family where there are other sons; the rather unusual steps that were taken for the will to be attested not by one but by two lawyers and for the certification of her mental capacity to be made by an important local personage who was an orthopaedic surgeon when a physician or ordinary medical practitioner would have sufficed; and the transfer of properties belonging to the estate of the deceased to the children of the defendant after notice had been given to his solicitors that the will was being challenged.

In the light of the foregoing facts and conscious of the principles above enunciated by Kerr, I was of the considered view that the three requirements advocated by Counsel for the defendant were amply satisfied for a receiver to be appointed. The plaintiffs indicated preparedness to having joint management and control of the estate of the deceased pending the disposal of the appeal and I thought this was a good compromise as it allowed the defendant to continue running the estate albeit with some supervision by the plaintiffs. I accordingly made an order for one of the nominated chartered accountants in the application, Chin Kwai Yong (with Liquidator's Licence No. 890/7/89 (J/PH)), to be appointed until judgment to receive the rents and profits and to manage those properties registered in the name of the deceased at the time of her death **unless the parties agreed to the same being done jointly by them by 31 October 1990**. In the absence of any objection on the part of Counsel for the defendant I also made an order in the circumstances for costs to be paid to the two plaintiffs in any event. The application was heard and disposed of on 30 September 1990.

Also found at [1991] 1 CLJ 587